16-443

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 467.

SAMUEL P. WALKER'S EXECUTORS, AND ROBERTSON TOPP'S ADMINISTRATOR, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 10, 1878.



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1 I. *Petition.—Filed August* 17, 1868.

In the Court of Claims.

SAMUEL P. WALKER
vs.
THE UNITED STATES. } No. 3437.

To the honorable judges of the Court of Claims:

Your petitioner, Sam'l P. Walker, a citizen of Shelby County, Tennessee, respectfully shows to your honors: That in April, 1865, he was lawfully possessed, and the owner of 3,405 bales of cotton, stored in sundry warehouses in East Mississippi and Alabama, and that said cotton so stored, was taken possession of by the officers and agents of the United States Treasury, in the summer of 1865, immediately after the occupation of the country by the United States forces; that said cotton after being seized by Treasury agents was sold, and the net proceeds paid into the Treasury of the United States.

Petitioner is unable to state the precise sum for which said cotton was sold, or the expenses incident thereto; that said cotton when seized was worth forty cents per pound; that the 3,405 bales av-
2 eraged 500 lbs. each, and that said cotton in the aggregate was worth $681,000, and that the net proceeds thereof he is entitled to receive.

Petitioner avers that his said cotton has never been abandoned or forfeited, or become liable to confiscation, or seizure or capture; that no part of said cotton or its proceeds was appropriated in any way to the use of the Army or Navy of the United States; that no proceedings for the purpose of condemning said cotton have ever been instituted before any court or tribunal, but that the same after being seized was turned over by Treasury agents, by whom it was sold and the net proceeds paid into the Treasury of the United States.

Petitioner avers that if there has been a valid and legal capture of said cotton, which is asserted by the United States, he is nevertheless entitled to receive the net proceeds of it, amounting to at least the sum of $600,000, under the provision of the act of Congress, approved March 12th, 1863, entitled "An act to provide for the collection of abandoned property, &c." That this claim has been presented to the Secretary of the Treasury, and by him rejected. It has not been presented to any other department or Congress.

3 Petitioner has never given any aid or comfort to the rebellion against the Government of the United States. For a valuable consideration to me moving, I executed a bond to Robertson Topp that I would account to him for ninety-five (95) per cent. of whatever might be collected on this claim, deducting therefrom first all expenses.

SAM'L P. WALKER.

STATE OF NEW YORK,
County of Niagara:

Before the undersigned, a commissioner for the circuit court of the United States for the northern district of New York, personally appeared Sam'l P. Walker, and signed the foregoing petition, and made oath according to law that there is no assignment or transfer of the claim therein stated, or of any part thereof, or any interest therein, except as herein stated, and that he is justly entitled to receive the amount therein

claimed from the United States, after allowing all just credits, and that he believes the facts stated to be true. Given under my hand and seal this first day of August, 1868; and the words "ninety-five (95)
4 per cent." interlined before signing in petition; also the words "there is," and the words "signed the foregoing petition and" above herein.

[SEAL.]

C. H. PIPER,
U. S. Commissioner.

[Cancelled U. S. revenue stamp.]

UNITED STATES OF AMERICA,
Northern District of New York:

I, Augustus A. Boyce, clerk of the circuit court of the United States for said district, hereby certify that C. H. Piper, whose name is affixed to the foregoing certificate is, and was at the date thereof, a commissioner of the United States for the northern district of New York, duly appointed as such. Given under my hand with the seal of said court at Utica, in said district, this 3rd day of August, 1868.

[SEAL.] AUGUSTUS A. BOYCE, *Clerk.*

[Cancelled U. S. revenue stamp.]

STATE OF TENNESSEE,
Shelby County:

Before the undersigned, Isaac Morrison, a commissioner of the
5 United States circuit court for the district of West Tennessee. personally appeared Robertson Topp, who made oath in due form of law that he has at all times borne true allegiance to the Government of the United States; that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

ROBERTSON TOPP.

Subscribed and sworn to before me this 27th day of July, A. D. 1868. Witness my hand and official seal.

[SEAL.] ISAAC MORRISON,
U. S. Com.

[Cancelled U. S. revenue stamp.]

UNITED STATES OF AMERICA,
District of West Tennessee:

I, Abram S. Mitchell, clerk of the United States circuit court for said district, hereby certify that Isaac Morrison whose name is affixed to the above certificate now is and was, at the signing thereof, a commissioner of the United States for said district, duly appointed and qualified as such. Witness my hand and the seal of said court, a to ffice inthe city of Memphis, this 27th day of July, A. D. 1868.

A. S. MITCHELL, *Clerk.*

[Cancelled U. S. revenue stamp.]

6 II. *Traverse and pleas.—Filed July* 19, 1860.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein, and not confessing the same, or any part thereof, deny each and every the allegations therein contained and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the

said United States are indebted to the said claimant in the sum of six hundred thousand dollars ($600,000), the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

7 And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not "within two years after the suppression of the late rebellion prefer his claim to the proceeds" of the property mentioned and described in the Court of Claims, as provided by the 3d section of the act of Congress, approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States.

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claim-
8 ant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth were made and done in the administration of, and in virtue and under color of, the act of Congress, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863; whereby and by virtue of the provisions of the act of Congress, entitled "An act regulating judicial proceedings in certain cases for the protection of officers and agents of the government, and for the better defence of the treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Asst. Atty. General.

9 III. *Motion to revive suit in the name of Walker's representatives, and the allowance of the same.*

And now, January 16, 1873, come the counsel for the claimant and mov the court to substitute Robertson Topp, along with Samuel P. Walker and John W. Walker, executors of the estate of Samuel P. Walker deceased, as claimants in the case, and that the suit hereafter proceed in those names and by that style.

R. M. CORWINE & SON,
Attorneys of Record for Claimant.

And now, January 20, 1873, the motion filed to allow the suit to be revived in the name of S. P. Walker's representatives is allowed.

10 IV. *Amended petition.—Filed November 20th, 1876.—J. R.*

SAMUEL P. WALKER'S EXECUTORS AND ROBERTSON TOPP'S ADMINISTRATOR
vs.
THE UNITED STATES.

The amended petition of Samuel P. Walker's executors and Robertson Topp's administrator shows the court:

That, moved by reasons of public policy, Abraham Lincoln, President of the United States and Commander-in-Chief of the Army and Navy, issued to the said Walker, on the 6th day of March, 1865, a permit in writing, authorizing him to go into the States then in insurrection, and to purchase cotton to be sold and delivered by said Walker to the regular trade agents of the Treasury Department, appointed under the act of July 2d, 1864, which writing contained an express order that the cotton so purchased should be free from forfeiture under the non-intercourse laws, and not liable to seizure or detention by the military authorit'es, and that the officers of the Army and Navy and all civil officers of the government should give the said Walker and his agents means of transportation, and also the cotton purchased by him free and unmo-

11 lested passage through the lines, (other than blockade lines,) and safe conduct within the lines while in transitu or in store awaiting transportation. The original of this written permit or order is on file in the Treasury Department, and a certified copy has already been filed in this case.

The said Walker was, at the date of said permit and continually afterwards, a resident of the city of Memphis, in the State of Tennessee, which city and the surrounding territory was then in the permanent military occupation of the United States. In pursuance of said permit, and to carry into effect the public policy indicated therein, the said Walker proceeded with all diligence to perfect arrangements with parties inside the Confederate lines, by which he would get out and turn over to the United States Treasury agents large lots of cotton. Among other operations, he proceeded to the city of Mobile, in the State of Alabama, where large lots of cotton were known to him to be held by private parties, ready to be transferred to him.

On the 12th day of April, 1865, the said city of Mobile was in the permanent military occupancy of the United States, and on that day the said Walker purchased from one D. O'Grady, a resident of Mobile, three thousand four hundred and five (3,405) bales of cotton, then stored in various localities in the State of Mississippi with persons who held the same, subject to the order of the said O'Grady. The said Walker took written titles and conveyances from said O'Grady for said cotton, and held the same thereafter, subject to his own sole order and control. The said Walker then returned immediately to the city of Memphis, Tennessee, and there, on the 21st of April, 1865, in pursuance of said permit and of the provisions of the 8th section of the act of Congress passed and approved July 2, 1864, and of the Regulations of the Secretary of the Treasury in that behalf, made and promulgated and approved by the President of the United States, upon all of which he relied, proceeded in good faith to make all of his arrangements to carry out said undertaking, and entered into the usual written agreement with George

12 H. Ellery, the regular agent of the United States Treasury Department at Memphis aforesaid, for the purchase of cotton of the insurrectionary States, whereby said Ellery agreed to purchase, on ac-

count of the United States, the 3,405 bales of cotton aforesaid, together with an additional lot, making in all five thousand bales, all of which was in regular form according to the rules prescribed. The original agreement aforesaid with said Ellery, agent, is hereunto attached and marked "Exhibit A," and is made a part of this amended petition. Owing to the confusion and disorder found to be prevailing in the country between Memphis and the places where the cotton was located, the means of transportation for said cotton to Memphis could not possibly be procured, and the cotton itself was in some danger of being destroyed.

After repeated efforts to get the cotton to Memphis, it was deemed best to have it transported to the city of Mobile, and accordingly said Walker proceeded to Mobile, and there, about the 1st of June, 1865, he entered into the usual written agreement with Francis W. Kellogg, the regular agent of the Treasury Department at Mobile, for the purchase of cotton of the insurrectionary States, whereby said Kellogg agreed to purchase, on account of the United States, the 3,405 bales of cotton aforesaid, together with a small additional lot, making in all three thousand five hundred (3,500) bales, or at least stated at 3,500 bales, in round numbers. The said agreement with F. W. Kellogg, agent, has already been filed in the case as Exhibit E to the deposition of Richard Macallister, taken on the 14th of February, 1873; and it is prayed that said agreement shall be taken as a part of this amended petition. The said sale to said F. W. Kellogg was made in pursuance of said Presidential permit, and to carry into effect the policy indicated therein.

The said Walker immediately proceeded to make arrangements for the transportation of said cotton to Mobile for delivery to said Kellogg, agent, as aforesaid; but he was confronted in every direction by disorders and confusion in the intervening country by the movements
13 or hostile armies, notwithstanding which, he was still prosecuting his efforts with prospects of success to get the cotton to Mobile, and deliver the same to said Kellogg, agent aforesaid. But on the 12th day of May, 1865, Major General Canby caused to be promulgated general field orders No. 39, a copy of which is on file in this case, certified and furnished from the War Department. This order was generally understood to apply to all cotton that had ever belonged to the Confederate Government, and, in effect, it made it absolutely impossible for said Walker to procure transportation for the cotton in question, for the reason that the cotton once belonged to the Confederate Government at Richmond. It was purchased from the private owners in 1862 and 1863 by one John Scott, Confederate States produce loan-agent for East Mississippi and Alabama, for and in behalf of the Confederate Government. He observed great care and particularity in taking from the persons from whom he purchased what was called planters' certificates, by which the cotton could be identified and located, and held at all times subject to ready sale and transfer to suit the convenience or necessities of the government for which he was acting. A transfer of these certificates, with proper endorsements, was the usual mode adopted to effect sales of such cotton when ordered by the Confederate authorities. The originals of such certificates are on file in the case. Some time in the latter part of 1864 the said John Scott, agent as aforesaid, was ordered by the Confederate authorities at Richmond to make sale of a portion of the cotton purchased by him as aforesaid, and for which he held planters' certificates. Accordingly, the said Scott did make such sales, and, among others, made sale of the cotton in question to D. O'Grady, of Mobile, from whom the said Walker purchased, as heretofore set forth. O'Grady

observed especial caution and care in making the purchase of Scott and the said Walker observed the same particular care in his purchase of O'Grady, so far as related to having these planters' certificates regularly and legally indorsed, that no question might afterwards
14 arise as to the identity, locality, quantity, and custody of the cotton. The sale of the cotton in question to O'Grady by Scott, and to Walker by O'Grady, was fully explained to General Canby, in Mobile, in April, 1865, with the books of Scott present. Yet the disturbance and uncertainty of affairs in that section prevented such an understanding being had (after the 12th of May) as to satisfy parties that they would not be violating General Order No. 39 if they gave transportation to the cotton; and it so resulted that the said Walker was prevented from getting the cotton to Mobile.

While the removal of the cotton to Mobile was thus delayed, it was seized by certain agents of the Treasury Department of the United States, appointed by the Secretary of the Treasury to collect certain cotton in the insurrectionary States. The said Walker protested against such seizure and demanded a restitution of his property, which was refused him. The custody and possession of it was forcibly taken from him and from those who held it subject to his order, and it was given over to armed soldiers and military guards, in violation and defiance of the permit and order of the President of the United States, under which he had acquired the title and had been proceeding in good faith from the beginning. Afterwards, the said agents of the Secretary of the Treasury shipped said cotton to Simeon Draper, the United States cotton agent in New York, and it was by him sold on account of the United States, and the net proceeds paid into the public Treasury. Some portions of the cotton may have been given to persons for guarding and transporting it, but what portion, if any, is unknown to the plaintiff, except in so far as they have been able to make it appear already in the testimony taken in the case and furnished from the departments. The plaintiffs charge that the seizure of the cotton as aforesaid was made under instructions from the Secretary of the Treasury, in violation of the rights and in disregard of the contract and covenant of freedom from such seizure given them by the President of the United States and Commander-in Chief of the Army and Navy,
15 and that, therefore, the United States is responsible to them, not only for the proceeds actually paid into the Treasury, but for all damage by way of loss of any part of the cotton, or other disposition of any part thereof, in furtherance of the unlawful proceeding aforesaid.

A copy of the "Instructions to all Supervising Special Agents," issued by the Secretary of the Treasury on the 21st of November, 1865, is hereto annexed and marked Exhibit B, and is prayed to be made a part of this amended petition.

Application was made to the Secretary of the Treasury for relief and settlement of this claim, but without such relief being afforded or such settlement being made.

The statement of D. M. Leatherman, deceased, marked Exhibit C, is hereto annexed, and prayed to be made a part of this amended petition, showing the instructions and assurances from the President of the United States under which said Walker took proceedings in relation to the purchase of the cotton in question.

The petitioners pray judgment for the value of said cotton at the time it was seized by the agents of the Treasury Department aforesaid, and they allege such value to have been $200 per bale.

The said Walker, in order to make the purchase and get control of said cotton, and thus carry out the policy and effect the results indicated in the Presidential permit aforesaid, was forced to use his own means and credit, and to incur heavy liabilities to creditors, and among others to Robertson Topp, deceased. By the seizure of his cotton as above set forth, and its conversion to the use of the United States, he was financially ruined, and by the seizure of this and other lots of cotton in like circumstances, his creditors, and those who had given him credit to enable him to complete his purchases, have incurred great loss, and many of them, including said Topp, have been completely ruined financially by his inability to meet his obligations incurred in the premises.

16 The said Samuel P. Walker's executors, and the said Robertson Topp's administrator, William G. Ford, (who has been made a party plaintiff in this case,) as plaintiffs, therefore seek relief and ask judgment against the United States for the sum of six hundred and eighty (680) thousand dollars, or for such sum as may be found due them in law and equity.

QUINTON CORWINE.

UNITED STATES OF AMERICA:
City of Washington, District of Columbia, ss:

Quinton Corwine, attorney for plaintiffs herein, being duly sworn, says that no assignment or transfer of the claim set forth in the foregoing petition, or any part thereof, has been made, except as in said petition stated; that said claimants are justly entitled to the amount claimed from the United States, after allowing all just credits and offsets, and that the facts stated in said petition are true to the best of his knowledge and belief.

[SEAL.] CHAS. S. JOHNSON,
Notary Public.

WASHINGTON, D. C., *November* 9, 1876.

EXHIBIT A.

[Form No.]

No. 7171.

MEMPHIS, TENN., *April* 21, 1865.

I, Geo. H. Ellery, agent for the purchase of products of insurrectionary States, on behalf of the Government of the United States, at Memphis, Tennessee, do hereby certify that I have agreed to purchase from Sam'l P. Walker, of Memphis, Tennessee, five thousand (5,000) bales of cotton, which it is represented are, or will be, at Grenada and Canton, in the county of , in the State of Mississippi, and which he stipulates shall be delivered to me, unless prevented from so doing by the authority of the United States.

17 I therefore request safe conduct for the said Sam'l P. Walker and his means of transportation and said products from said points to Memphis, where the products so transported are to be sold and delivered to me, under the stipulation referred to above, and pursuant to regulations prescribed by the Secretary of the Treasury.

[SEAL.] GEO. H. ELLERY,
U. S. Purchasing Agent.

Notice.

Products arriving,at Memphis under this permit must be delivered at the government warehouse, No. 93 Adams street, between Third and Fourth, and promptly reported to the United States purchasing agent. Neglect of this rule subjects the products to confiscation.

EXHIBIT B.

Instructions issued by Secretary of the Treasury 21st of November, 1865, in a circular letter addressed to all supervising agents.

In cases where cotton formerly belonging to the so called confederate government has been purchased, and is held by persons alleging that the same was purchased for the purpose of delivering it to the agents of this department, authorized to purchase the products of insurrectionary States on government account, in pursuance of contracts made with such agents, it will be taken by agents of this department and treated as captured property.

Persons claiming such property will be advised that upon presenting to the Secretary of the Treasury any claims they may have in the premises, contracts made by them with the purchasing agents will be respected; and parties who have acted in good faith in the execution of such contracts will be protected.

18 EXHIBIT C.

THIRTY-NINTH CONGRESS, U. S.,
HOUSE OF REPRESENTATIVES,
Washington, D. C., January 18, 1866.

I was present at an interview which Samuel P. Walker, of Memphis, Tennessee, had with President Lincoln last winter upon the subject of a permit which Mr. Walker obtained, to purchase and bring cotton out of the Confederate States. Mr. Walker said to the President in substance and nearly in the words following: "I wish to know with certainty my power and right under this permit. I wish to know, Mr. President, whether there are restrictions, especially, as to the legality of the parties, or whether the cotton is confederate cotton or not."

The President replied: "None, whatever; we want the cotton; we ask no questions from whom received. You may purchase from Jeff. Davis if you please."

R. P. BUCKLAND.

UNITED STATES OF AMERICA,
District of West Tennessee, ss:

D. M. Leatherman, on oath, says that he was present when the conversation above referred to took place between President Lincoln and Samuel P. Walker, and the above statement of General R. P. Buckland is correct, as I now recollect it.

D. M. LEATHERMAN.

Sworn to and subscribed before me this 29th day of January, A. D. 1866.

J. W. WESTCOTT,
U. S. Com'r District West Tennessee.

19 V. *Traverse of amended petition.—Filed May* 21, 1877.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the amended petition of the claimants filed November 20, 1876, herein, and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said amended petition as sets forth and avers that the United States are indebted to the said claimants in the sum of six hundred and eighty thousand dollars, says that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

THOMAS SIMONS,
Assistant Attorney-General.

20 VI. *Plea of limitation to amended petition.—Filed May* 21, 1877.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants, for the reason that the amended petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

21 VII. *Findings of fact and conclusions of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. Before the year 1865 John Scott, who was chief agent of produce-loan for Alabama and East Mississippi, of the Confederate States of America, so called, purchased 3,405 bales of cotton for the confederate government, in lots, at different times and of different planters, (among other purchases by him,) in the States of Alabama and Mississippi, and in each purchase took a receipt, certificate, and agreement from the planter, in the following form:

"STATE OF MISSISSIPPI,
"*County of* , *town or post-office* :

"NOVEMBER 27, 1862.

"The undersigned, having sold to the Confederate States of America, and received the value of the same in bonds, the receipt whereof is hereby acknowledged, one hundred and thirty-five bales of cotton, marked, numbered, and classed as in the margin, which is now deposited at plantation, hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same, at his own expense, at , in the State of Mississippi, to the order of the secretary of the treasury, or his agents or their assigns.

"ABERDEEN, *Nov.* 27, 1862.

"The undersigned, as agent of the government, certifies that the within cotton has been examined by him or by a competent judge, and that its character will rank, according to the commercial scale, as middling; and also, that the weights and marks are as described—the cot-

ton being in good merchantable order, marked with the name of the planter, and on one end the initials C. S. A., and safely stored in a covered building.

"The undersigned certifies that the price agreed upon is a fair market price at the present time.

"GRAY A. CHANDLER, *Ag't.*"

There were thirty-seven such certificates, to each of which were attached the number, weight, and marks of the bales purchased.

II. The confederate government, being in pressing need of raising large sums of money for the military department, and to pay debts incurred and incurring, authorized and directed said Scott to sell said cotton, and other cotton purchased by him in like manner. On the 6th of April, 1865, said Scott, in pursuance of said direction, at Mobile, in Alabama, where he resided and had his place of business, sold to one O'Grady, who was also a citizen and resident of said Mobile, all
22 of said cotton at the price of one dollar per pound in Confederate States money and transferred to him said thirty-seven planters' certificates, with his own certificate attached thereto or indorsed on each in the following form:

"CONFEDERATE STATES OF AMERICA,
"TREASURY DEPARTMENT,
"*April* 6, 1865.

"This is to certify that the within and above described cotton has been sold to D. O'Grady, bales, and delivery is hereby ordered to be made to him, or his order, with license to export the same from the Confederate States to any neutral port, on complying with the requisitions of the law.

"Given under my hand and the seal of the treasury department, on the year and day above mentioned.

"JOHN SCOTT,
"*Chief Ag't Produce Loan for Ala. & East Miss.*,
"P'r J. G. ULRICK, *Ag't.*"

III. On the 6th of March, 1865, the President gave to Samuel P. Walker, a citizen and resident of Memphis, Tenn., (whose executors are claimants in this case,) an order, of which the following is a copy:

"EXECUTIVE MANSION,
"*March 6th*, 1865.

"Whereas Samuel P. Walker, of Memphis, Tenn., claims to own products of the insurrectionary States, near Grenada and Canton, Miss., and Montgomery and Selma, Alabama, and has arrangements with parties in the same vicinities for other products of the insurrectionary States, all which he proposes to sell and deliver to agents authorized to purchase for the United States the products of the insurrectionary States, under the act of Congress of July 2nd, 1864, and the regulations of the Secretary of the Treasury, it is ordered, that all such products which a purchasing agent of the government has agreed to purchase, and the said Walker has stipulated to deliver, as shown by the certificate of the purchasing agent, authorized by regulations VIII, Form No. 1, appended to regulations attached hereto by such agent, and being transported, or in store awaiting transportation, for fulfillment of stipulations and in pursuance of the regulations of the Secretary of the

Treasury, shall be free from seizure, detention, or forfeiture to the United States; and officers of the Army and Navy, and civil officers of the government, will observe this order, and will give the said Walker, his agents, and means of transportation, and said products, free and unmolested passage through the lines, (other than blockade lines,) and safe conduct within the lines while going for or returning with said products, or while said products are in store awaiting transportation for the purposes aforesaid.

"ABRAHAM LINCOLN."

IV. On the 12th of April, 1865, at said Mobile, said Walker purchased of said O'Grady said 3,405 bales of cotton, and took from him a bill of sale of the same, of which the following is a copy, attached to a list specifying the number of bales, weight, and the names of the counties where originally purchased from the planters:

"For value received of Sam'l P. Walker, I hereby transfer, sell, and assign the above lots of cotton, amounting to 3,405 bales, without
23 recourse upon me, & the holders thereof will please deliver the same to the said Walker, or his authorized agent.

"D. O'GRADY.

"APRIL 12TH, 1865."

At the same time said O'Grady indorsed and delivered said thirty-seven planter's certificates to said Walker.

The cotton all remained on the plantations, and the only delivery to Scott or O'Grady, or Walker, was by the planter's certificates and the transfers of the same, as hereinbefore set forth.

V. On the 1st of June, 1865, F. W. Kellogg, who was agent for the purchase of cotton in insurrectionary States, on behalf of the United States, entered into an agreement with said Walker, of which the following is a copy:

[Form No. 1.]

"MOBILE, ALABAMA, *June 1st*, 1865.

"I, Francis W. Kellogg, agent for the purchase of cotton of insurrectionary States, on behalf of the Government of the United States, at Mobile, Alabama, do hereby certify that I have agreed to purchase from Samuel P. Walker, esq., of Memphis, Tennessee, thirty-five hundred bales of cotton, which, it is represented, are or will be stored at Green, Pickens & Marengo Co.'s, in State of Ala., & with planters in the counties of Lauderdale, Noxubee, Lowndes, & Monroe, in the State of Mississippi, and which he stipulates shall be delivered to me, unless prevented from so doing by the authority of the United States.

"I therefore request safe conduct for the said Samuel P. Walker and his means of transportation, and said cotton from where it is stored to Mobile, where the cotton so transported is to be sold and delivered to me, under the stipulation referred to above, and pursuant to regulations prescribed by the Secretary of the Treasury.

"F. W. KELLOGG,
United States Purchasing-Agent.

"NOTICE.—Cotton arriving at Mobile under this permit must be promptly reported to the United States purchasing agent."

VI. Between the 30th of June and the 1st of December, 1865, 1,922$\frac{3}{4}$

bales of said cotton were seized on the plantations where they had continued to remain, in the counties of Lowndes and in other counties in said State of Mississippi, by Treasury agents appointed by the Secretary of the Treasury to collect cotton which had been sold to the Confederate States, and were sent to New York, sold, and the net proceeds thereof covered into the United States Treasury, amounting to .

The following additional facts are found by request of claimants:

VII. The city of Mobile, Ala., and also the city of Memphis, Tenn., were in the military occupation of the United States on the 12th of April, 1865, and remained so until the close of the war.

VIII. The counties of Lowndes and other counties in the State of Mississippi, where the cotton in question was stored, and where it was subsequently seized by the United States Treasury agents, were not in the military occupancy of the United States on the 12th day of April, 1865, but were held and occupied by the so-called confederates.

IX. Mobile was invested by the Federal gunboats continually from 1862 up to its capture on the 12th day of April, 1865

24 X. The negotiations for the sale of this cotton to O'Grady took place in the early part of the year 1865, and the final conveyance delayed until April 6, 1865, and finally completed on that day, by reason of the ill-health of Scott, and for other reasons.

XI. It was the custom in making sales of cotton in that section of the country, (Alabama and Mississippi), as this cotton was, to transfer the planter's certificates as if negotiable, and this was the usual and generally the only mode of delivery made or required.

XII. On the 5th of May, 1865, by the surrender of General Taylor, commanding the confederate forces in Alabama and Mississippi, the counties in which this cotton was located passed under the military control of Gen. E. R. S. Canby, commanding the United States forces at Mobile, and the United States military authorities seized all the lines of railway and steamboats in that section, and on the 10th of May, 1865, General Canby issued Order No. 39, of which the following is a copy:

"HEADQUARTERS ARMY AND DIVISION OF WEST MISSISSIPPI,
"*Mobile, Alabama, May 10th*, 1865.

[General Field-Orders No. 39.]

"The cotton belonging to the Confederate government in East Louisiana, Mississippi, Alabama, and West Florida having been surrendered to the Government of the United States, its sale to private individuals, or its transfer to any persons, except the officers or agent of that government, is prohibited. This order applies to all cotton procured by subscriptions to the cotton loan, by the sale of confederate bonds or notes, by the tax in kind, or by any other process by which the title was vested in the confederate government, whether in the possession of the agents of that government, or still in the hands of the producers; and all persons in whose charge it may be will be held accountable for its delivery to the agents of the United States. Commanders of districts will be furnished with a transcript from the records of the cotton agents, showing the quantity and location of the cotton within the limits of their commands, and will give the agents of the Treasury Department appointed to receive it such facilities as may be necessary to enable him to secure it.

"Any sales of this property, in violation of this order, will be treated as the embezzlement of public property.

"By order of Major-General E. R. S. Canby.

(Signed) "C. T. CHRISTENSEN,
"*Lt-Colonel, Ass't Adjutant-General.*

"By order of Major-General E. R. S. Canby.

"C. H. DYER,
"*Capt., Ass't Adjutant-General.*

Conclusions of law.

1. The order of President Lincoln of March 6, 1865, was not a license or permit which authorized Walker to purchase the cotton in question at Mobile at the time and under the circumstances set forth in the findings.

2. Said Walker acquired no title as against the United States to the cotton purchased by him of O'Grady.

3. The claimants have no cause of action, and their petition must be dismissed.

25 VIII. *Opinion of the court.*

RICHARDSON, J., delivered the opinion of the court:

This action was commenced by petition filed August 17, 1867, under the captured and abandoned property act of March 12, 1863, (12 Stat. at Large, 820,) to recover the proceeds of 3,405 bales of cotton, alleged to have belonged to Samuel P. Walker, the claimants' testator, when they were seized by an agent of the Treasury Department in Alabama and Mississippi, in 1865, sent to New York, sold, and the proceeds covered into the United States Treasury. On the 20th of November, 1876, an amended petition was filed, joining the administrator of Robertson Topp as a party with the executors of the original claimant, Samuel P. Walker, who had died, and setting forth the cause of action in a different form and more in detail. To this latter petition the defendants have filed a plea of the statute of limitations. As to Topp's administrator the plea becomes immaterial, since the facts found do not show that Topp ever had any interest in the case, and the claimants' attorney will have leave to strike out his name and claim from the petition, as suggested at the trial might be done in case his interest should not be proved. Walker's executors are properly admitted as parties. As to the cause of action set forth in the amended petition, and the allegations therein in support of the same, the claimants' counsel present them as in the nature of a new count added to the original declaration, or as a bill of particulars more fully specifying the case, and not as introducing a new cause of action. They rest their whole case upon the captured and abandoned property act. We so treat the pleadings, and have incorporated into the findings no fact not material under the original petition, and therefore we overrule the plea of limitations.

Of the 3,405 bales claimed as the property of said Walker, 1,922$\frac{3}{4}$ bales were, by agents of the Treasury Department appointed to collect cotton belonging to the Confederate States within insurrectionary territory, seized as such Confederate cotton between the 30th of June and the 1st of December, 1865, upon the plantations where the same had been raised, in the counties of Noxubee and Monroe, and in other coun-

ties in Mississippi, and were sent to New York, sold, and the proceeds covered into the Treasury. As the cotton was seized after the 30th of June, 1865, jurisdiction of the claim would have been transferred to the Secretary of the Treasury by the act of May 18, 1872, chapter 172, section 5, (17 Stat., 134,) but for the proviso therein excepting claims in cases then pending in this court.

The main point in controversy upon the findings is as to the ownership of the cotton by said Walker, the validity of his title by purchase, or his right to the same as against the United States, and this requires the determination of several important questions of law.

Walker was a citizen and resident of Memphis, Tenn., which was in the military occupation of the forces of the United States, while the whole State was declared to be in insurrection by the President's proclamations, and so continued to the close of the war. (12 Stat., 1262; 13 Stat., 730.)

On the 6th of March, 1865, the President gave to Walker a written paper, of which the following is a copy:

"EXECUTIVE MANSION,
"*March 6th*, 1865.

"Whereas Samuel P. Walker, of Memphis, Tenn., claims to own products of the insurrectionary States near Grenada and Canton, Miss., and Montgomery and Selma, Alabama, and has arrangements with parties in the same vicinities for other products of the insurrec-
26 tionary States, all which he proposes to sell and deliver to agents authorized to purchase for the United States the products of the insurrectionary States, under the act of Congress of July 2nd, 1864, and the regulations of the Secretary of the Treasury, it is ordered that all such products which a purchasing-agent of the Government has agreed to purchase, and the said Walker has stipulated to deliver, as shown by the certificate of the purchasing-agent, authorized by Regulations VIII, Form No. 1, appended to regulations, attached hereto by such agent, and being transported or in store awaiting transportation for fulfillment of stipulations and in pursuance of the regulations of the Secretary of the Treasury, shall be free from seizure, detention, or forfeiture to the United States; and officers of the Army and Navy, and civil officers of the Government, will observe this order, and will give the said Walker, his agents, and means of transportation, and said products, free and unmolested passage through the lines, (other than blockade lines,) and safe conduct within the lines, while going for or returning with said products, or while said products are in store awaiting transportation for the purposes aforesaid.

(Signed) "ABRAHAM LINCOLN."

On the 12th of April, 1865, the day on which Mobile surrendered to the Federal arms, Walker was there and purchased of one O'Grady the 3,405 bales of cotton mentioned in the petition, and took a bill of sale of the same and received from O'Grady, with his indorsement thereon, thirty-seven bills of sale, commonly called "planters' certificates," given originally to said O'Grady's vendors, and duly transferred to him. The cotton was first purchased by the Confederate States government of the different planters by whom it was raised, and whose bills of sale or certificates therefor, to the number of thirty-seven, were given to the Confederate agent, in each of which the planter acknowledged payment in bonds for the cotton sold by him, certified that the same was on his plantation, and agreed "to take care of said cotton while on his plantation, and to

deliver the same at his own expense [at a place named] in the State of Mississippi, to the order of the Secretary of the Treasury or his agent or their assigns." The cotton was all on plantations within the rebel lines, and was never delivered otherwise than by the certificates and transfers thereof as before stated, and was never in the actual possession of Walker or either of the previous owners, except the planters who still had the custody of the same up to the time of the seizure.

Subsequently, on June 1, 1865, Walker made a contract with F. W. Kellogg, agent of the United States for the purchase of cotton in the insurrectionary States on Government account, to sell to him said 3,405 and other bales of cotton by an agreement of which the following is a copy:

"MOBILE, ALABAMA, *June 1st*, 1865.

"I, Francis W. Kellogg, agent for the purchase of cotton of insurrectionary States, on behalf of the Government of the United States, at Mobile, Alabama, do hereby certify that I have agreed to purchase from Samuel P. Walker, of Memphis, Tennessee, twelve thousand (12,000) bales of cotton, which, it is represented, are or will be stored at Selma, & on the Warrior River, Ala., and with different planters in the counties of Monroe, Lowndes, & Noxubee, in the State of Mississippi, and which he stipulates shall be delivered to me, unless prevented from so doing by the authority of the United States.

"I therefore request safe conduct for the said S. P. Walker and his means of transportation, and said cotton, from where it is stored to
27 Mobile, where the cotton so transported is to be sold and delivered to me, under the stipulation referred to above, and pursuant to regulations prescribed by the Secretary of the Treasury.

"F. W. KELLOGG,
"*United States Purchasing Agent.*

"NOTICE.—Cotton arriving at Mobile under this permit must be promptly reported to the United States purchasing agent."

It is maintained on the part of the claimants that the writing given by the President to Walker on the 6th of March was a permit or license for him to purchase within hostile territory, from the citizens thereof, the products of insurrectionary States, and so far removed the restrictions of the non-intercourse acts as to him and his purchases. We do not so regard it.

The act of July 13, 1861, chap. 3, sec. 5, (12 Stat., 257), authorized the President by proclamation to declare the inhabitants of any State, or any section or part thereof, to be in insurrection against the United States, and provided that "thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue." The same section also provided "that the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury"; and power was given to the Secretary to appoint officers to carry into effect such licenses. Proclamations declaring what States and parts of States were in insurrection, and the prohibition of com-

mercial intercourse therewith, were issued August 16, 1861; May 12, 1862; and April 2, 1863, (12 Stat., 1262, 1263; 13 Stat., 730). The Secretary of the Treasury made rules and regulations for conducting and carrying on the limited commercial intercourse which the President should license, and the President made and issued executive orders February 28, 1862, and March 31, 1863, giving notice of what intercourse he permitted and licensed. For copies of orders see Hamilton vs. Dillon, (21 Wall., 76, 77).

On the 2d of June, 1864, by act of that date, chapter 325, sec. 9, (13 Stat., 377), it was enacted "that so much of section 5, of the act of July 13, 1861, aforesaid, as authorizes the President, in his discretion, to license or permit commercial relations in any State or section the inhabitants of which are declared in a state of insurrection, is hereby repealed, except so far as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States, within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied, and also excepting so far as may be necessary to authorize persons residing within such lines to bring or send to market in the loyal States, any products which they shall have produced with their own labor, or the labor of freedmen or others employed and paid by them, pursuant to rules relating thereto, which may be established under proper authority." And by section 8 of the same act provisions were made for a new kind of commercial intercourse with the people in insurrection, by which agents were to be appointed by
28 the Secretary of the Treasury, with the approval of the President, to purchase for the United States any products of the insurrectionary territory, subject to the restrictions therein expressed.

Thus it will be seen that on the 2d of July, 1864, the President's power to authorize commercial intercourse and grant permits and license to trade with the insurgents, which had been conferred upon him by Congress, was taken away by statute, and he had no right thereafter to issue a license to trade to anybody, with the limited exceptions mentioned in the section cited and not material in this case, (6 C. C. R., 420), unless that right belonged to him as commander-in-chief of the Army, and the supreme head of the executive power.

In England that right is unquestionably conceded to the sovereign, who, having the power to declare war and peace, may remove, in whole or in part, that incident of war by which the subjects are prohibited from having commercial intercourse with the inhabitants of hostile territory (1 Ch. Robinson's Admiralty R., 197). But by the Constitution of the United States (Const., art. 1, sec. 8) Congress alone can declare war, and any right which is merely incident to that power, and which rests thereon exclusively for authority, would seem not to exist in the President without the consent or against the will of Congress. Nor would it seem to be possessed by the President as commander in chief of the Army and Navy, except so far as it might be necessary for the maintenance, movement, and supply of the forces under his control, and the military operations by him conducted, since, beyond that, great questions of commercial and political public policy would be involved, more appropriate for determination by Congress than by the executive.

But it is not necessary to rest this case upon the power or want of power in the President to grant permits or license to trade with the subjects of the enemy, or within hostile territory, because, in our opinion, the written paper relied upon by the claimants, given to Walker on the 6th of March, was not a license or permit to trade; that it is not

so expressed and was not so intended. It begins by reciting that Walker claimed to own products in the insurrectionary States, and had arrangements with parties therein for other such products, and that he proposed to sell the same to agents of the United States authorized to purchase such products for the government, and then it proceeds to set forth what the President does grant thereby. He orders that all such products which a purchasing agent has agreed to purchase shall be free from seizure, detention, and forfeiture, and all officers of the Army and Navy, and all civil officers of the government, are directed to observe this order, and give said Walker, his agents, and means of transportation, and said products, free and unmolested passage through the lines, and safe conduct within the lines, while going for or returning with said products, and while said products are in store awaiting transportation. There are no words of license to trade in the document. It is a mere pass or order, cautiously limited to matters connected with the products which were owned or controlled by Walker, and granted to him nothing but for himself and his products "safe-conduct, unmolested passage, and freedom from seizure, detention, and forfeiture." It was issued and is drawn up in language strictly with reference to the purchasing of products of insurrectionary States by the agents of the United States, and in aid of that object, and it conferred no authority or benefit which Walker did not have without it under section 8 of the act of July 2, 1864 (13 Stat., 377), and the regulations of trade made by the Secretary of the Treasury, except as an order and passport from the commander-in-chief, granting to him "free and unmolested passage through
29 the lines, and safe conduct within the lines while going for and returning with said products," and exemption from seizure of himself and his products.

It does not purport to give Walker a general license to purchase products and cannot be so construed even if the President had the power to confer such a privilege upon him. And when the language is read in the light of the important fact that Congress had taken away from the President by statute the power previously conferred upon him of granting licenses to carry on commercial intercourse, it seems conclusive that this document was not intended to, and did not authorize commercial intercourse except as provided by the statutes, and that it only recognized Walker's right to sell to the United States agents the products which he owned or might control, and assured him protection and safe conduct for the same and for himself. As a passport and order for protection it was within the clear and unquestionable power of the commander-in-chief to grant, and was of great importance and might become of great value to Walker, who was an enemy, residing in hostile territory, occupied by the Union forces, claiming to own and control property within the lines of the enemy. To such a person so situated, the order allowing him "free and unmolested passage through the lines and safe conduct within the lines," and protection for himself and his products, conferred upon him an exceptional privilege which sufficiently indicates the object and scope of the document and renders it unnecessary to give to it any further effect in order to carry out the will of the President, thus distinctly expressed, and to that extent exercised within his legal and constitutional authority.

If, then, the claimant's testator was not licensed by the order of the President to make the purchase which they rely upon to prove his title to the cotton, it is necessary to determine whether or not he was prohibited by the non-intercourse acts from thus acquiring title to such property so situated as against the United States.

As has been seen, the act of 1861 (12 Stat., 257) prohibited all commercial intercourse between citizens of States and parts of States declared in insurrection by the President's proclamation and the citizens of the rest of the United States. In July, 1861, the President issued his proclamation (12 Stat., 1262) declaring in insurrection the inhabitants of the States of Tennessee, Alabama, Mississippi, and other States, excepting such parts as "may from time to time be occupied and controlled by forces of the United States engaged in the dispersion of said insurgents." By proclamation of April 2, 1863, (13 Stat., 731,) the President revoked that exception, saving only the ports of New Orleans, Key West, Port Royal, and Beaufort, and some counties of Virginia. This left the parts of insurrectionary States occupied and controlled by the Federal forces declared to be in rebellion as the rest of the States to which they belonged. Then followed the act of 1864, chapter 225, (13 Stat., 376,) where by section 4 it was enacted as follows: "The prohibition and provisions of the act approved July 13, 1861, and of the acts amendatory or supplementary thereto, shall apply to all commercial intercourse by and between persons residing or being within districts within the present or future line of national military occupation in the State or parts of States declared in insurrection, whether with each other or with persons residing or being within districts declared in insurrection within those lines."

It has been decided by the Supreme Court that a citizen of that part of an insurrectionary State held and controlled by the military forces of the United States could have commercial intercourse neither with the citizens of the loyal States, Cutner's case, (17 Wall., 517,) nor with the citizens of disloyal States, outside of the territory so occupied, Ensley's case, (9 C. C. R., 12.) The facts now before us present the case of a citizen of one place, occupied by the Union forces within an insurrectionary State, having commercial intercourse with a citizen of another place, held in like manner within another insurrectionary State, the two places being separated by intervening territory and under the command of different military officers, General Canby at Mobile, and General Thomas at Memphis, and the property purchased being mostly in still another insurrectionary State, and all within the rebel lines.

At the time of his purchases Walker was a citizen of Memphis, which had been occupied by the Federal forces since June 6, 1862, within the State of Tennessee, which was declared to be in rebellion. O'Grady was a citizen and resident of Mobile, Ala., which was similarly situated. On the very day that Mobile surrendered to the national arms Walker appeared in that place, and concluded his purchase from O'Grady of the large quantity of 3,405 bales of cotton on plantations in Alabama and Mississippi. The purchase and sale of property between such persons so situated, and under such circumstances, would seem to be clearly prohibited by the 5th section of the act of July 13, 1861, (12 Stat., 257,) as amended and affected by the act of July 2, 1864, chap. 225, §§ 4–9, (13 Stats., 376, 377,) and so rendered void thereby as against the United States, according to the decisions of this court and of the Supreme Court heretofore rendered. Walker, being a citizen of Memphis, could gain no rights of general commercial intercourse with the citizens of Mobile by going there with the army when that city surrendered, or by remaining if he were there before the surrender. His rights depended upon the place of his domicile. (Desmare's case, 10 C. Cls. R., 386; 93 U. S. R., 605.)

It appears to have been the policy of the law to shut out from general

commercial intercourse with everybody the inhabitants of sections of insurrectionary territory occupied by the United States armies in the field; and the citizens of the different isolated sections so held did not, on account of being similarly situated, have a right to pass over intervening territory and trade with each other in places and States in which they did not reside. If they had possessed such right, they would have been privileged above all other citizens of both loyal and disloyal territory. The prohibition of commercial intercourse by citizens of the occupied places applied to trade "whether with each other or with persons residing or being within districts declared in insurrection within those lines."

The circumstances under which Walker made his purchase do not aid in rendering valid his title. It was consummated on the very day Mobile fell into Federal power; when the hostile armies were exhausted and severely pressed on all sides; when the confederacy as an armed power was crumbling in pieces, and the territory within which the cotton was stored was about to be surrendered, and in less than a month, on the 5th of May, 1865, was surrendered to the Union Army. The transaction was a purely speculative one, not authorized nor encouraged even under the statute and regulations for the purchase of the products of insurrectionary States, by the National Government through its authorized agents.

The claimant's case is not altered by the fact that on the 1st of June, 1865, he entered into a written agreement with a Treasury agent to sell the cotton to the United States. If his title was not valid against the United States, the act of the purchasing-agent would not bind the government to pay for what it had a better title to itself. He had no authority to waive any rights of the United States, and the proceed-
31 ings authorized for the purpose of obtaining from the producers themselves the products of insurrectionary territory could not be used to cover a defective title, or aid speculative transactions, or deprive the United States of their legal rights of conquest.

It has been said by the Supreme Court, "Neither was the law nor were the regulations through which it was administered designed to protect a speculation wherein the products contracted to be sold were to be procured by contractors within the rebel lines after the contract was made. Besides this, we decided that private citizens were prohibited from trading at all in the insurrectionary districts; that the object of the law and the regulations made to carry them into effect was to encourage the insurgents themselves to bring their products to us." (Maddox vs. United States, 15 Wall., 62; United States vs. Lane, 8 Wall., 185.)

It would be a clear evasion of the law to allow cotton purchased as this was by Walker to be sold to the United States through an agent appointed to encourage the insurgents themselves to bring in their own products for sale to the United States.

If we go behind the claimant Walker's purchase we shall find the title of his vendor also tainted with a fatal defect, of which Walker had notice, and subject to which he bought the cotton. O'Grady, who sold to Walker, purchased directly of the Confederate States, through an agent of that de facto government, who was authorized and directed to make sale of this and other cotton, to raise money for the pressing needs of the armies in the field and to meet its other obligations, and who received payment at a dollar a pound in Confederate notes. And this purchase was made at Mobile only five days before the rebels evacuated that city, and six days before it surrendered to the Union forces.

The cotton was sold to aid the rebellion by supplying the government with means to continue resistance to the national armies.

By the decision in Sprott's case, such a purchase was void as against the United States. (Sprott vs. The United States, 20 Wall., 459.) That case and this cannot be distinguished in principle. Sprott was a citizen and resident of Mississippi, within the Confederate lines, and there purchased his cotton of an agent of the Confederate States, and paid for it in the currency of the United States. The only difference between the two cases is that in Sprott's case payment was made in United States currency, and in this case it was made in Confederate notes. These notes were of value to the Confederacy at that time, and they constituted the only currency through which the rebel government conducted its domestic purchases, paid its officers and soldiers, and supported its armies in hostile resistance. To furnish that government with Confederate notes was aiding the rebellion as much as to furnish it with United States currency, the difference being only in the value of the money, and the difference in value was made up for by difference in quantity. In Sprott's case the cotton sold for 10 cents a pound in United States currency, and in this case for $1 a pound in Confederate notes.

If this purchase by O'Grady was void as against the United States, the purchase from him by Walker was equally void, for Walker knew the title of O'Grady, and took the same tainted with all its illegality and defects. He not only took a bill of sale of the cotton without recourse to O'Grady, but he received from him the 37 original planters' certificates, receipts, and agreements, by which it appeared that the planters sold to the Confederacy, and agreed to take care of the cotton and deliver it to the order of the secretary of the rebel treasury, or his agents, or their assigns, to each of which the rebel cotton-agent attached a transfer under his hand and official title, with direction to the
32 planters to deliver the cotton to O'Grady, or his order, and accompanied by a license to export the same from the Confederate States. And these planters' certificates, with the rebel agent's transfer and license to export, were all indorsed by O'Grady and passed over to Walker at the time of purchase by him. They constituted more than notice to him of the illegality of the purchase by O'Grady as against the United States; they were the muniments of his title, and contained his authority to take possession of the cotton and remove it beyond the rebel lines, an authority granted by the Confederate Government, and resting upon that power alone for its validity. Without these certificates and orders and license, Walker would have no claim even to possession of the cotton while the Confederates held control of the territory, and he never did, in fact, obtain possession, because the rebel power was soon afterward forever broken and destroyed, and the officers of the United States, its conquerors, seized the cotton by right of conquest before Walker reached it to assert his title; and if to the Union military officers he had asserted title thereto, through the fallen power and the order of that hostile organization, it would have merited and rightly received no more respect than is given by the courts of the Union to the contracts and orders of the rebel government when their execution would be to the injury of the United States.

Walker's title and right of possession, as against the United States, were trebly defective: first, in his own purchase in violation of the non-intercourse acts; second, in the illegal purchase by O'Grady from the enemies of the Union in hostile organization, of which he had notice;

and, third, in being himself obliged to claim through transfers, orders, and licenses from that hostile organization.

The transactions were throughout, in the language of the Supreme Court, "tainted with the vice of the rebellion," and that vice, as against the United States at least, destroys every contract, makes void every purchase, and bars every claim into which it enters. (Whitfield vs. The United States, 93 U. S. R., 170, 171.)

The judgment of the court is that the petition be dismissed.

LORING, J., although absent at the time of entering judgment, was present at the trial of this case, took part in the decision, has read this opinion, and concurs in the conclusions.

33 *IX. Request of claimants for additional findings of fact filed after the findings of fact found by the court, and the ruling thereon.*

The complainants now come and move the court to make the following findings in addition to the findings already filed, to wit:

1st. That the city of Mobile, Alabama, and also the city of Memphis, Tennessee, were in the military occupation of the United States on the 12th day of April, 1865, and remained so until the close of the war.

2d. That the counties of Noxubee, Monroe, Lowndes, Lauderdale, Clark, and Winston, in the State of Mississippi, where the cotton in question was stored, and where it was subsequently seized by the United States Treasury agent, were not in the military occupancy of the United States on the 12th day of April, 1865, but were held and occupied
34 by the so-called Confederates.

3d. That Mobile was invested by the Federal gunboats continually from 1862 up to its capture on the 12th day of April, 1865.

4th. That the negotiations for the sale of this cotton to O'Grady took place in the early part of the year 1865, and the final conveyance was delayed until April 6th, 1865, and finally completed on that day by reason of the ill health of Scott, and for other reasons.

5th. That it was the custom in making sales of cotton in that section of the country (Alabama and Mississippi), as this cotton was, to transfer the planter's certificates as if negotiable, and this was the usual and generally the only mode of delivery made or required.

6th. That on the 5th day of May, 1865, by the surrender of General Taylor, commanding the Confederate forces in Alabama and Mississippi, the counties in which this cotton was located passed under the
35 military control of General E. R. S. Canby, commanding United States forces at Mobile, and the United States military authorities seized all the lines of railway and steamboats in that section, and on the 10th of May, 1865, General Canby issued Order No. 39, of which the following is a copy:

[General Field Order No. 39.]

HEADQUARTERS ARMY AND DIVISION
OF WEST MISSISSIPPI,
Mobile, Alabama, May 10th, 1865.

The cotton belonging to the Confederate Government in East Louisiana, Mississippi, Alabama, and West Florida having been surrendered to the Government of the United States, its sale to private individuals or its transfer to any persons, except the officers or agents of that gov-

ernment, is prohibited. This order applies to all cotton procured by subscriptions to the cotton-loan by the sale of Confederate bonds or notes, by the tax in kind, or by any other process by which the
36 title was vested in the Confederate Government, whether in the possession of the agents of that government or still in the hands of the producers; and all persons in whose charge it may be will be held accountable for its delivery to the agents of the United States. Commanders of districts will be furnished with a transcript from the records of the cotton-agents showing the quantity and location of the cotton within the limits of their commands, and will give the agents of the Treasury Department appointed to receive it such facilities as may be necessary to enable him to secure it.

Any sales of this property in violation of this order will be treated as the embezzlement of public property.

By order of Major-General E. R. S. Canby.

(Signed) C. T. CHRISTENSEN,
Lt. Col. Ass't Adj't-Gen.

By order of Major-General E. R. S. Canby.

C. H. DYER,
Capt. Ass't Adj't Gen.

37 Respectfully submitted.

QUINTON CORWINE,
Att'y for Claimants.

WASHINGTON, D. C., *May* 27, 1877.

Upon the foregoing requests for further findings of fact the court makes the following ruling, to wit:

All allowed.

By the court.

May 29, 1877.

38 *X. Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the fourth day of June, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimants, Samuel P. Walker's Executors and Robertson Topp's Administrator, be dismissed.

39 *XI. Application for an appeal and order allowing same.*

Now come the claimants aforesaid, by their attorney, and move the court for allowance of appeal to the Supreme Court of the United States.

QUINTON CORWINE,
Att'y for Claimant.

Filed June 13, 1877.

Ordered that the appeal be allowed as prayed for.

By the court.

June 13, 1877.

40 In the Court of Claims.

SAMUEL P. WALKER'S EXECUTORS AND ROBERTSON TOPP'S ADMINISTRATOR, *vs.* THE UNITED STATES. } No. 3437.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregaing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the request of claimants' counsel for additional findings of fact, and the ruling of the court thereon, of the final judgment by the court, of the application by the claimants for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this eleventh day of February, A. D. 1878.

[SEAL.]

JOHN RANDOLPH,
Ass't. Clerk Court of Claims.

(Indorsement on cover:) No. 467. Samuel P. Walker's Executors & Robertson Topp's Administrator, appellants, vs. The United States. Court of Claims. Filed 10th September, 1878.

16-413

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

WALKER'S EXECUTORS
vs.
THE UNITED STATES. } No. 24

APPEAL FROM THE COURT OF CLAIMS.

POINTS AND AUTHORITIES IN BEHALF OF PLAINTIFFS.

WARNER M. BATEMAN,
Of Counsel for Plaintiffs.

W. H. Moore, Printer, 311 Eleventh Street.

Plaintiff's 16-43

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APPEAL FROM THE COURT OF CLAIMS.

POINTS AND AUTHORITIES IN BEHALF OF PLAINTIFFS.

1. The United States can acquire title to the property of an enemy only by capture, including surrender, or by confiscation.

The description of property subject to *capture*, is shown in the proviso to Sec. 1 of the Act of Congress of March 12, 1863—the captured and abandoned property act—*U. S. Statutes, Vol.* 12, *p.* 820.

It is property "which has been used, or which was intended to be used, for waging or carrying on war against the United States."

The United States vs. Klein, 13 Wal., 136.
Titus vs. The United States, 20 Wal., 481.

2. There can be no *confiscation* of the property of an enemy by the United States without previous legislation by Congress, defining the manner and extent in and to which confiscation shall be made, and no confiscation of such property can be made except in the manner and only to the extent so authorized.

Brown vs. The United States, 8 Cranch, 152.
The United States vs. Klein, 13 Wal., 136.
Miller vs. The United States, 11 Wal., 268.

3. There are four Acts of Congress authorizing the con-

fiscation of the property of enemies. These Acts comprise all the legislation of Congress upon this subject:

The Act of July 13, 1861, U. S. Stat., Vol. 12, p. 257–8.
" Aug. 6, " " " " " p. 319.
" July 17, 1862, " " " " p. 590–2.
" Mar. 12, 1863, " " " " p. 820.

All these Acts provide for judicial proceedings for the determination of the question of confiscation.

The United States vs. Klein, 13 Wal., 137.

4. The Act of March 12, 1863, provides for a process of seizure that does not, as in the case of actual capture in war, divest the title of the owner of the property, but takes the property into the custody of the United States, for sale and adjudication with respect to the ownership of the proceeds; and the right of seizure, custody and sale, is confined to the two classes of property expressly designated, to wit: captured property and abandoned property.

The United States vs. Klein, 13 Wal., 136.

5. *Captured* property is such property as has been actually seized by the Army and taken into military possession.

The United States vs. Paddleford, 9 Wal., 531.
" " Klein, 13 " 138.
Sprott vs. The United States, 20 " 465.
Lamar vs. Brown, 92 U. S., 193.

Abandoned property is described in the closing sentence of *Sec. Two*, and of *Sec. Three*, of the Act of Congress of July 2, 1864, as follows: "Property real or personal shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged either in arms or otherwise in aiding or encouraging the rebellion."

U. S. Stat., Vol. 13, *p.* 376.

6. The property in question was not *captured* property. There is no finding of fact to this effect by the Court of Claims, and the record shows no evidence of military seizure.

The surrender by Gen. Taylor to Gen. Canby does not present a case of *constructive* capture, with respect to the property in question. This surrender only embraced prop-

erty belonging to the Confederacy, at the time of the surrender; and, as against the Confederacy, beyond question, the title to the property had then passed to O'Grady, and from O'Grady to Walker.

7. It was not *abandoned* property. It remained from the time of the purchase by Walker in his control—the control of a loyal citizen of the United States, who had at no time, either in arms or otherwise, engaged in aiding the rebellion.

8. The seizure of the property as captured or abandoned property, by the Agent of the Treasury, was therefore unauthorized and unlawful, and was not a valid proceeding under the Act of March 12, 1863.

9. If the question of confiscation or forfeiture can be tried in this case upon other grounds than of capture or abandonment, the property was not forfeitable under the Act of July 13, 1861. By this Act, only property "coming from" the States in rebellion "into other parts of the United States," or "proceeding to" the States in rebellion, was forfeited.

This was not such property. It was seized not in process of transportation, but on the plantations where it was produced.

10. Forfeiture under the Acts of July 13, 1861, Aug. 6, 1861, and July 17, 1862, is the enforcement of a penalty against a *person*, either as an *enemy* or a *citizen* of the United States, requiring proceedings *in rem* for the judicial condemnation of the property seized.

11. The Acts of Aug. 6, 1861, and July 17, 1862, forfeit property purchased, given, used or employed *by any person in aid of the rebellion, or the property of persons engaged in the rebellion, and persons aiding and abetting the rebellion.*

There is no evidence that any person ever purchased, gave, used or employed the property in question in aid of the rebellion, or that it was ever the property of any person engaged in the rebellion, or in aiding and abetting it, except as may be shown in the transactions of the sale to or the purchase from the Confederacy.

12. The forfeiture, if made, must be enforced against one or more of the three parties to these two transactions.

It cannot be enforced against the Confederacy.

The Confederacy was not contemplated by this legislation. Its existence was a crime to be punished, but it was not the subject of legislation by Congress with respect to the regulation of its conduct.

The Confederacy was a belligerent body politic, whose existence as such the United States recognized.

Williams vs. Bruffy, 96 U. S., 176.
Ford vs. Surgit, 97 U. S., 594.
Prize cases, 2 Black., 635.
The United States vs. Rice, 4 Wheat., 246.
Thorington vs. Smith, 8 Wal., 1.

13. The Confederacy could acquire and transfer title to property.

Whitfield vs. The United States, 92 U. S. 165.
Williams vs. Bruffy, 96 U. S., 176.
Coolidge vs. Gutherie, 8 Am. Law Reg., N. S., 22.

But the United States could acquire property from the Confederacy only—

1. By capture in war.
2. By succession upon conquest.

The United States vs. McRae, 8 Law. and Eq. Rep., 69.
The United States vs. Prioleau, 2 Hemming & Miller, C. C., 559.

14. The laws of the United States were not operative within the territory of which the parties to these transactions were residents, at the time of their occurrence. Both persons and property were then subject to the laws of the *de facto* Government, at that time dominant there. By these laws the sale to the Confederacy by the original owner, and the purchase by O'Grady were lawful.

The United States vs. Rice, 4 Wheat., 246.
The United States vs. Paddleford, 9 Wal., 531.

15. The laws of the United States could only operate upon persons and property in the condition in which they were found by these laws, when their authority was restored, upon the suppression of the rebellion, and the displacement of the Confederate Government. At that time, the property had passed into the lawful possession and ownership of O'Grady.

16. The original owner held and parted with an unquestionable title, and O'Grady held a title indisputably good

as against both the original owner and the Confederacy. Neither the original owner nor the Confederacy could avoid or reclaim it.

17. No forfeiture under any of the Acts of Congress referred to, could be enforced, or could occur, by reason of the transaction between Walker and O'Grady.

Neither the consideration paid by Walker, nor the property obtained by him, were intended to aid, or did in fact aid the rebellion, nor did Walker have notice of anything in the sale by the Confederacy to O'Grady, that was intended to aid or that did in fact aid the rebellion, and it is not asserted that Walker purchased the property from O'Grady with any intention to defraud or injure the United States. On the contrary, his purpose was the furtherance of the public policy of the Government.

The United States vs. Anderson, 9 Wal., 56.

18. The assertion that Walker took the property tainted with a fatal defect as purchased and paid for by O'Grady to aid the Canfederacy, and that Walker had knowledge of the fact, is not supported by the facts.

(1.) The record contains no finding to this effect, and there is no evidence in the case to show that O'Grady intended to aid the rebellion, by this purchase.

(2.) To constitute the purchase an act in aid of the rebellion, it must be shown that O'Grady intended such aid, and this must be shown otherwise than by the mere fact of the purchase.

Armstrong vs. Toler, 11 Wheat., 258.
Medford vs. McClintock, 47 Ala., 650.
Gardner vs. Barger, 4 Heirkell, 671-2.
Addison on contracts, vol. 1, 425. (See 290 note.)
Benjamin on sales, 496. (See 510 *et seq.*, note.)
Pollock on contracts, 263.
Delmas vs. Ins. Co., 14 Wal., 665.
Story on Con., Secs. 499, 506.
McBlair vs. Gibbs, 17 How., 232.

19. Under the Act of March 12, 1863, the only requirement on the part of the claimant, to entitle to recovery is proof of—

1st. Ownership *by the claimant;*

2d. The loyalty *of the claimant*, without respect to the loyalty of any previous owner.

The United States vs. Carroll, 13 Wal., 151.

20. If the non-intercourse Act—the Act of July 13, 1861, is applicable to the question of Walker's title, he did not violate its provisions in any respect.

The Act of July 2, 1864, Sec 8, (*U. S. Stat. Vol.* 13, *p.* 337,) enacted an important exception to this prohibition of commercial intercourse, arising from the necessity of obtaining cotton for the supply of the United States and British markets, with a view to the relief of our manufactories, the removal of the inducement for interference by Great Britian, and for the purpose also of withdrawing the cotton from the Confedercy, as its chief resource for the prosecution of the rebellion. A rapid and extensive shipment of cotton, through the open door-way of the Treasury agencies, was the policy of the Government and the object of this law; and its provisions are to be liberally construed with refe:ence to this end. There is no restriction as to ownership, as to whom "the seller" shall be. The agents of the Confederacy itself are not excluded.

21. The Treasury *regulations* only limit the authority of the Treasury Agent, as to contracts of purchase, to persons who at the time of the purchase own or control the property purchased.

Walker having an arrangement with O'Grady and others for the purchase of cotton, arranged with the President

1st. For safe conduct through the lines of the Army;

2d. For exemption from military seizure.

This arrangement was made, with the view, on the part of the President, of forwarding the policy of the Government, and the purposes of the law.

The order of the President was available by Walker, for protection against an attempted capture, and against any assertion of adverse right or title under such attempt.

22. The order and Walker's action under it, were within the exact scope and purpose of section eight of the Act of July 2, 1864.

23. Walker was the owner of the cotton at the time he contracted for its sale to the purchasing Agents of the Treasury.

24. The fact that Walker might have profited by the transaction, was neither an offense against the laws of the United States, nor did it interfere with or obstruct the purpose or policy of the Government. His profit was taken

out of the Confederate owner and left that much less of consideration money for circulation in the Confederacy.

25. *The law contemplated* the payment of money into the Confederacy, for the cotton to be obtained by the United States, and *contemplated* that the cotton should be brought out from the Confederacy by Treasury Agents.

Walker intended nothing else—did nothing else. The entire transaction was intended by the President and by Walker to further the purposes of this legislation.

26. The forfeitures asserted as against this property, if tenable upon any alleged ground, are discharged by the Executive proclamations of amnesty—July 24, 1868, and Dec. 25, 1868.

The United States vs. Paddleford, 9 Wal., 531.
" " Klein, 13 " 128.
" " Armstrong, 13 " 154.
Pargood vs. The United States, 13 " 156.
Carlisle vs. The United States, 16 Wal., 151.
Sprott vs. The United States, 20 Wal., 467.

27. The amnesty covers the offence of the original owner and all asserted forfeitures under the laws of Aug. 6, 1861, and of July 17, 1862. It covers O'Grady's offence, if he rendered aid to the rebellion by his purchase from the Confederate Government, and cures every possible defect, in Walker's title.

The non-intercourse Act was a war measure for the suppression of the rebellion.

If Walker, by reason of any violation of its provisions, incurred the forfeiture of this property, the forfeiture is discharged.

WARNER M. BATEMAN,
Of Counsel for Plaintiffs.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

WALKER'S EXECUTORS
v.
THE UNITED STATES.

24

APPEAL FROM COURT OF CLAIMS.

PLAINTIFF'S BRIEF.

Supreme Court of the United States.

OCTOBER TERM, 1881.

WALKER'S EXECUTORS
against
THE UNITED STATES.

FACTS.

Samuel P. Walker, the plaintiff's testator, was a loyal citizen of and resident in Memphis, in the disloyal State of Tennessee, during the rebellion. He was the owner of a considerable quantity of cotton, and had knowledge of a large lot of Confederate cotton, comprising over four thousand bales, stored in various locations in the States of Mississippi and Alabama, beyond the lines of military occupation by the National army; that the cotton had been purchased previous to 1865 for the Confederate States by their produce loan agent, John Scott, then in Mobile, and that Scott was under instructions from the Confederate government to sell cotton. Dominic O'Grady, also resident in Mobile, had contracted for the purchase of the cotton from Scott, and had also made arrangements with Walker for a sale to him, and upon this un-

derstanding Walker made known to President Lincoln the circumstances as presenting an opportunity to bring into possession of the United States this large lot of Confederate cotton, in addition to the cotton owned by Walker, the latter having been acquired by purchase, and, therefore not such property as could be sold to Treasury agents, under act of July 2, 1864, because it was not "produced with his own labor or the labor of freedmen, or others employed and paid by him."

The President thereupon gave the following permit:

EXECUTIVE MANSION, March 6th, 1865.

Whereas Samuel P. Walker, of Memphis, Tenn., claims to own products of the insurrectionary States, near Granada and Canton, Miss., and Montgomery and Selma, Alabama, and has arrangements with parties in the same vicinities for other products of the insurrectionary States, all of which he proposes to sell and deliver to agents authorized to purchase for the United States the products of the insurrectionary States, under the act of Congress of July 2d, 1864, and the regulations of the Secretary of the Treasury, it is ordered that all such products which a purchasing agent of the Government has agreed to purchase and the said Walker has stipulated to deliver, as shown by the certificate of the purchasing agent, authorized by Regulations VIII, Form No. 1, appended to regulations attached hereto by such agent, and being transported, or in store awaiting transportation, for fulfilment of stipulations and in pursuance of the regulations of the Secretary of the Treasury, shall be free from seizure, detention, or forfeiture to the United States; and officers of the army and navy and civil officers of the Government will observe this order, and will give the said Walker, his agents, and means of transportation, and said products

free and unmolested passage through the lines, (other than blockade lines,) and safe conduct within the lines while going for and returning with said products, or while said products are in store awaiting transportation for the purposes aforesaid.

ABRAHAM LINCOLN.

In order to understand clearly whether this permit would authorize the transaction contemplated between O'Grady and Scott, Walker requested from the President more specific instructions. This request was made in the presence of General R. P. Buckland and David M. Leatherman, and the substance of the President's verbal instructions in reply set forth in "Exhibit C," on page eight of the record, is as follows:

THIRTY-NINTH CONGRESS, U. S.
HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., January 18, 1866.

I was present at an interview with Samuel P. Walker, of Memphis, Tennessee, had with President Lincoln last winter upon the subject of a permit which Mr. Walker obtained, to purchase and bring cotton out of the Confederate States. Mr. Walker said to the President in substance and nearly in the words following: "I wish to know with certainty my power and right under this permit. I wish to know, Mr. President, whether there are restrictions, especially, as to the loyalty of the parties, or whether the cotton is Confederate cotton or not."

The President replied: "None whatever; we want the cotton; we ask no questions from whom received. You may purchase from Jeff Davis, if you please."

R. P. BUCKLAND.

Believing himself to be thus invested with the requisite authority, Walker proceeded by the way of the City of New Orleans and the Gulf to the vicinity of Mobile, keeping within the lines of the Federal occupation. Finding Mobile then under *blockade* lines, which he could not cross, because such lines were excepted in the paper which he held from the Pesident, he however managed, on the 6th day of April, 1865, to procure the completion of O'Grady's understanding with Scott, and on the 12th of April entered the City of Mobile with the National forces, who raised the blockade on that day, and took possession of the city, and thereafter continued to hold the same until the close of the war.

Walker then proceeded immediately to execute his arrangements with O'Grady, by which the title to the Confederate cotton was transferred to himself, preparatory to the sale of the property to an agent of Treasurey Department of the United States, under a form prescribed in the permit. He then returned to Memphis, where he arrived on the 21st of April, 1865, and on that day sold the lot of cotton, including that previously purchased, to George H. Ellery, Treasury agent at that place. See "Exhibit A," page 7 of the record, which is as follows:

MEMPHIS, TENN., April 21, 1865.

I, Geo. H. Ellery, agent for the purchase of products of insurrectionary States, on behalf of the Government of the United States, at Memphis, Tennessee, do hereby certify that I have agreed to purchase from Samuel P. Walker of Memphis, Tennessee, five thousand (5,000) bales of cotton, which it is represented are, or will be at Grenada and Canton, in the county of , in the State of Mississsippi, and which he stipulates shall be delivered to me, unless prevented from so doing by the authority of the United States.

I therefore request safe conduct for the said Samuel P. Walker and his means of transportation and said products from said points to Memphis, where the products so transported are to be sold and delivered to me, under the stipulation referred to above, and pursuant to regulations prescribed by the Secretary of the Treasury.

GEO. H. ELLERY,

U. S. Purchasing Agent.

After several ineffectual efforts to move the cotton through the lines of occupation for delivery at Memphis it was deemed best to abandon that undertaking, and to attempt to get it out by the way of Mobile. Walker thereupon returned to Mobile, and on the first of June, 1865, sold the cotton to F. W. Kellogg, United States Treasury agent for the purchase of cotton in the insurrectionary States, who had in the meantime been appointed and located at that place, Kellogg agreeing to purchase, on account of the United States, the 3,405 bales of cotton aforesaid, together with a small additional lot, making in all three thousand five hundred (3,500) bales, or at least stated at 3,500 bales, in round numbers. The agreement with Kellogg has already been filed in the case as Exhibit E to the deposition of Macallister, taken on the 14th of February, 1873; and it is prayed that said agreement shall be taken as a part of the amended petition. The sale to Kellogg was made in pursuance of the Presidential permit, and to carry into effect the policy indicated therein.

Walker thereupon proceeded to make arrangements for the transportation of the cotton to Mobile for delivery to Kellogg, but was confronted in every direction by disorders and confusion in the intervening country by the movement of hostile armies, notwithstanding which he was still

prosecuting his efiorts with prospects of success to get the cotton to Mobile, and deliver the same to Kellogg, agent aforesaid. But on the 12th day of May, 1865, Major-General Canby had caused to be promulgated general field orders No. 39, a copy of which is on file in this case, certified and furnished from the War Department. This order was generally understood to apply to all cotton that had ever belonged to the Confederate government, and in effect it made it absolutely impossible for Walker to procure transportation for the cotton in question, for the reason that the cotton once belonged to the Confederate government at Richmond. It was purchased from the private owners in 1862 and 1863 by one John Scott, Confederate States produce loan agent for East Mississippi and Alabama, for and in behalf of the Confederate government. He observed great care and particularity in taking from the persons from whom he purchased what was called planters' certificates, by which the cotton could be identified and located, and held at all times subject to ready sale and transfer to suit the convenience or necessities of the government for which he was acting. A transfer of these certificates, with proper endorsements, was the usual mode adopted to effect sales of such cotton when ordered by the Confederate authorities. The originals of such certificates are on file in the case. Some time in the latter part of 1864 Scott was ordered by the Confederate authorities at Richmond to make sale of a portion of the cotton purchased by him as aforesaid, and for which he held planters' certificates. Accordingly, he made such sales, and among others made sale of the cotton in question to D. O'Grady, of Mobile, from whom Walker purchased as hereinbefore set forth. O'Grady observed especial caution and care in making the purchase of Scott, and Walker observed the same particular care in his purchase of O'Grady, so far as related to having

these planters' certificates regularly and legally endorsed, that no question might afterwards arise as to the identity, locality, quantity, and custody of the cotton. The sale of the cotton in question to O'Grady by Scott, and to Walker by O'Grady, was fully explained to General Canby, in Mobile, in April, 1865, with the books of Scott present. The disturbance and uncertainty of affairs, however, in that section prevented such an understanding being had (after the 12th of May) as to satisfy parties that they would not be violating General Order No. 39, if they give transportation to the cotton; and it resulted that Walker was prevented from getting the cotton to Mobile.

While thus obstructed it was seized by agents of the Treasury Department of the United States, appointed by the Secretary of the Treasury to collect cotton in the insurrectionary States. Walker protested agaist such seizure, and demanded a restitution of his property, which was refused him. The custody and possession of it was forcibly taken from him and from those who held it subject to his order, and, under the direction of the agents of the Treasury Department, was given over to armed soldiers and military guards in violation and defiance of the permit and order of the President of the United States, under which he had acquired the title, and had been proceeding in good faith from the beginning. It was afterwards shipped to Simeon Draper, the United States cotton agent in New York, and sold on account of the United States, and the net proceeds paid into the public Treasury. Some portions of the cotton may have been given to persons for guarding and transporting it, but what portion, if any, is unknown to the plaintiff, except in so far as they have been able to make it appear already in the testimony taken in the case and furnished from the departments. The plaintiffs charge that the seizure of the cotton as aforesaid was made under instructions from the Secretary of the Treasury, in violation of

the rights and in disregard of the contract and covenant of freedom of such seizure given by the President of the United States and Commander-in-Chief of Army and Navy, and that, therefore, the United States is responsible to them, not only for the proceeds actually paid into the Treasury, but for all damage by way of loss of any part of the cotton, or otner disposition of any part thereof, in furtherance of the unlawful proceeding aforesaid, (see p. 11 of Record,) and relying entirely upo i his Presidential permit, immediately undertook its removal and delivery at Mobile from the local warehouses. But General Canby having, on the 12th of May, issued an order prohibiting the sale or transfer (Record, pp. 21 and 22), all further efforts to move the cotton were thereafter stopped by the military authorities. The cotton was subsequently seized by the military authorities as "abandoned and captured property," and sold, and the proceeds placed in the Treasury of the United States

Errors.

The Court of Claims below ruled :—

1st. That the order of President Lincoln of March 6, 1865, was not a license or permit which authorized Walker to purchase the cotton in question at Mobile at the time and under the circumstances set forth in the findings.

2d. That Walker acquired no title as against the United States to the cotton purchased by him of O'Grady.

3d. That the claimants had no cause of action, and that their petition must be dismissed.

In these rulings the Court erred.

Argument.

The act of 13th July, 1861, refers only to intercourse by *citizens of loyal States* with the enemy. It had no reference to trade between citizens of disloyal States in the enemy's territory. The question in this case is whether one enemy could acquire title by purchase from another enemy in enemy's territory. Walker was an enemy, and both Scott and O'Grady were enemies. If they had all been resident beyond the lines of Federal occupation, the lawfulness of their intercourse would not have been questioned.

The question, therefore, more definitely stated is, whether an enemy, *resident within the lines of Federal occupation* of the enemy's territory, can acquire title by purchase from another enemy *also resident within such lines.*

The defendant contends that the
the act of July 2, 1864, rendered such
void; and the cases of Cutner (17 W
and Ensly (9 Court of Claims R., p
Cutner's case the transaction was between an enemy, resident in territory under Federal occupation, and *a citizen of the loyal States;* and in Ensly's case it was between an enemy resident in occupied territory and another enemy resident in hostile territory *not occupied.* The cases differ essetially from the present case. The act of July 2, 1864, does no more than declare unlawful any trading between enemies resident in territory within Federal occupation and other enemies resident within territory not so occupied.

The act of 1861 was merely declaratory of the general law of nations, and must be applied and construed in that view.

Under the general laws of war, and as declared by the act of 1861, no title can pass between the citizens of one belligerent and those of the other. But Congress has no power to legislate in regard to the

transfer of titles between enemies in enemy's territory in time of war.

United States vs. Rice, 4 Wheaton, p. 246.

And in time of peace is the transfer of titles in the States a proper subject of Congressional legislation? It belongs to the States. When Federal power had been extended by conquest over any portion of enemy's territory, it devolved, during the continuance of hostilities, on the military authorities of the invading army to establish rules and regulations governing the conduct of the individual enemies occupying such territory; and a violation of such rules and regulations might be punished by any personal penalty the conqueror might choose to prescribe—even death; but they could not affect titles to property beyond the lines of conquest and acquired under the local laws there in force.

Even admitting the act of July 2, 1864, can be construed to render unlawful intercourse between citizens of two distinct sections of enemy territory, but both in Federal occupation, separated by intervening territory not occupied, such unlawfulness created by the statute could, nevertheless, entail no more than punishment for misdemeanor. It could not go to the extent of invalidating titles acquired under the local law. No such power in vested in Congress.

It is by force of the general law of nations that no title can pass from citizens of one belligerent to those of another, and the force of the act of July 13, 1861, is thus derived. But no such force attaches to the act of July 2, 1864, because this act is not declaratory of the general law, but is an *innovation* on the laws of war insomuch as it attempts to legislate on titles in enemy's territory and between enemies *while war is still going on.*

The cases of Lane (8 Wallace, p. 185) and Maddox

(15 Wallace, p. 58) are obviously not in point. In these cases citizens of loyal States were suing for damages resulting from a breach of contract involving commercial intercourse with the enemy in the enemy's territory.

The defendant cites Snell vs. Dwight, p. 18 of his brief; but the decision relates only to "licenses to trade to citizens of the States not in rebellion."

Licenses to trade are either general or special, and must be respected by all officers and tribunals of the State which issues them.

Halleck, chap. 27, secs. 1 and 2, p. 675.

General licenses, as a rule, in the United States are given under authority of an act of Congress.

Same section.

But "in special cases, and for purposes connected "with the prosecution of a war, by the President "as Commander-in-Chief."

P. 677.

A special license must, as a general rule, also emanate from the supreme authority of the State.

Note the exceptions, p. 677, sec. 3.
See section following.

No action of Congress can take away this discretion from him.

Halleck, p. 379.
Luther vs. Borden, 7 Howard Rep.
Story on Con., sec. 1342.
Martin vs. Mott, 12 Wheaton, 19.
Tucker's Blackstone, vol. 1, p. 392.
Secs. 28, 30, Halleck, p. 380.

The original power of the President as Commander-in Chief is, by the Constitution and by the

laws of nations and of war, beyond the control of Congress while war exists.

Waiving the question as to the authority of the President to license citizens of the loyal States to trade with the enemy, after the passage of the act of July 13, 1861, his authority as Commander-in-Chief of an invading army, while actual war is waged by him in the enemy's country, to deal by military authority alone with the inhabitants of such portions of territory as he may reduce to subjection by force of arms, is unquestionable. (The Grapeshot, 9 Wallace, p. 129.) He may not only license, but command, any of such inhabitants to cross his lines of occupation for the purpose of trade with other enemies, or for any other purpose, and he may enforce such command by holding the property of such conquered inhabitants, subject to destruction or other penalty, all of which he may enforce by martial law. Invested with such power over conquered enemies, while occupying their territory with his invading army, how can it be denied that he may, by his military authority, license or prohibit trade between them?

But there is one thing which the conqueror cannot do by military or any other authority. He cannot prevent the title of property passing from one enemy to another, under the local laws in force, while the war still continues and before the political status becomes fixed by peace.

The license given to Walker in this case was ample to enable a captured enemy to go into any portion of the enemy's country and there deal with his fellow citizens. Its terms are minutely criticised by the defendant, but there is certainly enough in it to authorize him to cross the lines of military occupation and return, and to bring back with him such property as he then owned, and also "other products" *not owned by him*, but for which he had "arrangements" with other parties resident in the hostile territory.

It need not be contended that the act of July 13,

1861, authorized any such license as this to be given to *citizens of a loyal State;* and it is not necessary to contend that such a license to *such citizens* would have been legal either under the act or outside of the act of July 2, 1864, or July 13, 1861. This license was not to *such citizens*, but to an enemy. It was given not under, *nor in accordance with*, the law regulating trade by the enemy with the Treasury agents.

It was a military permit to cross certain lines and return with property then owned by Walker, and also with other property not then owned by him, but for which he *represented* that he had some indefinite "arrangements" with *other enemies*.

It was not such property as he had "already" sold to some Treasury agent, as required by the act of 1864, but, to use the exact words, "which he *proposes* to sell and deliver." The "arrangements" spoken of with other parties had to be perfected before Walker could acquire any title which he could sell and transfer to a Treasury agent. The completion of such "arrangements" is clearly contemplated, and upon their completion the President gives assurance *in advance* that such property may then be sold to an agent of the United States under the same forms as were required for the products *described in the act of* 1864, and when such forms shall have been complied with, and not before, safe conduct and protection shall be extended over the property, not only *in transitu*, but while "in store "awaiting transportation." The property thus referred to as under "arrangements" was a large lot of Confederate cotton stored in Mississppi, no great distance from Memphis, in relation to which there had been some arrangements through one O'Grady ever since the early party of the year 1865, but the final consumation of which had been delayed. (See Finding X.)

Walker proceeded to the vicinity of the parties with whom he had the "arrangements," But he did not immediately enter Mobile, where O'Grady

and Stott were, because it was then invested by the Federal gunboats, (see Finding IX,) and was under the "blockade lines," *excepted in the permit.* On the very day the "blockade" was raised Walker went into the city with the Presidential permit, and the "arrangements" were promptly perfected. He afterwards sold the property to one Treasury agent Ellery an the 21st April, 1865, (see Record, p. 7,) and went through the forms specified in the permit; and when it proved impossible to deliver to this agent, he sold to another agent on the 1st of June following. (See Record, p. 11.)

It is provided in the statute that safe conduct for property sold to Treasury agents shall be given by the *agents*, and such safe conduct was given by the *agents* for this property. But the instrument of writing given in this case by the President *in advance* of the sale to an agent, and when the title was not in Walker, but dependent on the completion of "arrangements" referred to, was an extraordinary proceeding, and was meant to be something very much more than the ordinary proceeding provided for in the statute.

The purpose is explained in the evidence in the case. There was a pressure on the Government in relation to cotton. Our foreign relations were becoming troublesome on that account. The President and Secretary of State fixed upon the plan of sending certain trustworthy, loyal residents of the seceding States beyond the lines of military occupation for the purpose of procuring, if possible, the moving out of large quantities of cotton. This was at a time when nearly all the cotton was well known to be owned by the rebel government. General Buckland's explanation of the purpose and intention of the Government has been already referred to.

(Exhibit C. Record, p. 8.)

THIRTY-NINTH CONGRESS U. S.,
HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., January 18, 1866.

I was present at an interview which Samuel P. Walker, of Memphis, Tennessee, had with President Lincoln last Winter upon the subject of a permit which Mr. Walker obtained to purchase and bring cotton out of the Confederate States. Mr. Walker said to the President, in substance and nearly in the words following: "I wish to know with cer-" tainty my power and right under this permit. I " wish to know, Mr. President, whether there are " restrictions, especially as to the loyalty of the " parties, or whether the cotton is Confederate cot-" ton or not." The President replied: "None " whatever. We want the cotton; we ask no ques-" tions from whom received. You may purchase " from Jeff. Davis, if you please."

R. P. BUCKLAND.

UNITED STATES OF AMERICA, } ss:
District of West Tennessee. }

D. M. Leatherman, on oath, says that he was present when the conversation above referred to, took place between President Lincoln and Samuel P. Walker, and the above statement of General R. P. Buckland is correct as I now recollect it.

D. M. LEATHERMAN.

Sworn to and subscribed before me this }
29th day of January, A. D., 1866. }

J. W. WESTCOTT,

U. S. Com'r, Dist. West Tennessee.

This was a construction of the written permit by the President himself at the time he gave it. But it was more than this. It was a *verbal license* not only to *purchase* the cotton, but to purchase from any source, however disloyal; and as to restrictions, there were "none whatever." Such a verbal license or instruction to Walker was as valid as if reduced to writing. He needed no writing from the President, except the safe conduct. He did need that, because it could not be given by a Treasury agent *in advance* of the "*purchase*." The Commander-in-Chief gave it—as he had authority to do—and he accompanied it with verbal instructions to *purchase* without restrictions, and from *any source*.

The decision in Sprott's case (20 Wallace, p. 471) does not apply to a purchase made, as this was, under instructions from the President and for the public interest. The court bases the decision in that case upon personal turpitude of the purchaser in rendering aid to the public enemy by his purchase. The purchase in this case was to supply the "want" of the Government, as expressed by the President himself to the purchaser, and was made for the express purpose of being sold and delivered "to agents authorized to purchase for the United States."

It was in furtherance, not in derogation, of public policy, and was sufficient, at least, to raise the "*ownership*" contemplated in the act of March 12, 1863.

The "Abandoned and Captured Property Act" of March 12, 1863, under which this suit is brought, was intended as a favor to those loyal persons resident in insurrectionary States who, being enemies in the eye of the law, yet merited the treatment of friends. The gracious provisions of the act cannot be denied, upon a mere technicality about *legal title*, to a zealous loyalist, who, to meet a pressing public want, expressed to him by the President, risked his personal safety, invested all the means he could command himself, or obtain from others,

and earnestly executed an enterprise which was in compliance with the wishes of the President, and designed for the public interest. The *ownership* he thus acquired entitles him to the benefit of the act. His whole investment was seized, bringing ruin to himself and those from whom he borrowed the money to make it.

It is now in the public Treasury. It cannot remain there without shame to the Government.

QUINTON CORWINE.
JOHN POOL.
Counsel for Plaintiffs

Addenda.

The following authorities are referred to with respect to *general power* vested in the President as Commander-in-Chief in time of war to grant special licenses to citizens of the *loyal States* to trade with the enemy.

1. It is a universally recognized principle that all subjects or citizens of belligerent powers are enemies.

Halleck, chap. XV., sec. 8, p. 357.

2. Absolute interruption and interdiction of all commercial intercourse and dealings.

Same chap., sec. 9, p. 357.

3. Martial law a necessity in state of war.

Same chap., sec. 25, p. 373.

4. Martial law only to be declared and administered by the Sovereign or Executive.

Same chap., secs. 2, 6. *et seq.*

5. The power to suspend the writ of *habeas corpus* only an incident to martial law.

Sec. 27.

6. That power, like all powers for the conduct of a war, vested in the President, not in Congress.

See pp. 378 and 379, and sec. 30, p. 380.

From all which results that in a state of war the President, in his capacity as Commander-in-Chief, exercises the war power of the Government "*virtute officii*," and that martial law becomes part of the Constitution.

7. *Licenses* to trade are either general or special, and must be respected by all officers and tribunals of the State which issues them.

Chap. 27, secs. 1 and 2, p. 675.

8. *General licenses*, as a *rule*, in the United States are given under authority of act of Congress.

Same sections.

9. But "in special cases, and for purposes connected with the prosecution of a war, by the President as Commander-in-Chief."

P. 677.

10. A *special* license must, as a rule, also emanate from the supreme authority of the State.

Note the exceptions, p. 677, sec. 3.

See sections following.

Conclusion.

From the above it is very clear that, under the Constitution, and by virtue of his office, the President, has *unqualified discretion* as to granting licenses to trade.

No action of Congress can take away this discretion from him.

Halleck, p. 379.
Luther vs. Borden, 7 Howard Rep.
Story on Con., sec. 1342.
Martin vs. Mott, 12 Wheaton, 19.
Tucker's Blackstone, vol. 1, p. 392.
Secs. 28, 30, Halleck, p. 380.
See Fluker vs. U. S., 14 C. C., p. 256.
See Diekelman vs. U. S., 92 U. S., p. 520.

Chief Justice Waite, speaking for this Court, says:

"Martial law is the law of military necessity in the actual presence of war. It is administered by the General of the Army, and is, in fact, his will. Of necessity it is arbitrary, but it must be obeyed."

Diekelman vs. U. S., 92 U. S., 520.

Chief Justice Drake, speaking for the Court of Claims, December Term, 1878, says:

"An authority exercised at his own will by a military commander, invested in a time of war with supreme military power, is not to be revised by any civil tribunal. That can be done by his military superior only."

See Fluker vs. U. S., 14 Nott & Hopkins, p. 256.

President Lincoln, in his letter of Aug. 26, 1863, (see Barrett's Life of Abraham Lincoln, p. 475,) says:

"I think that the Constitution invests its Commander-in-Chief with the law of war in the time of war. Is there, has there ever been, any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it helps us or hurts the enemy? Armies the world over destroy enemies' property when they cannot use it; and even destroy their own to keep it from the enemy. Civilized belligerents do all in their power to help themselves or hurt the enemy, except a few things regarded as barbarous or cruel."

In his message to Congress, December 3, 1861, he says:

"I have, therefore, in every case thought it proper to keep the integrity of the Union prominent as the primary object of the contest on our part, leaving all questions which are not of vital military importance to the most deliberate action of the Legislature. In the exercise of my best discretion, I have adhered to the blockade of the ports held by the insurgents, instead of putting in force, by proclamation, the law of Congress enacted at the late session for closing those ports. * * * If a new law upon the same subject shall be proposed, its propriety will be duly considered. The Union must be preserved, and hence all indispensable means must be employed."